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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 436

DREW PEARSON AND AMERICAN BROADCASTING COMPANY, INC., a Corporation, *Petitioners*,

v.

MARY G. GARIEPY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, appellees below, Drew Pearson and American Broadcasting Company, a corporation, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on June 11, 1953 (R. 26).

OPINIONS BELOW

The opinion and judgment of the majority of the United States Court of Appeals for the District of Columbia Circuit and the minority opinion are set forth at R. 23-26.

The opinion of the United States District Court for the District of Columbia rendered on April 29, 1952 which was reversed, is set forth at 104 F. Supp. 681, R. 15A-21A. The order of the United States District Court for the District of Columbia entered on May 5, 1952, is set forth at R. 21A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 11, 1953 (R. 26). An order denying a petition for rehearing was entered by majority vote on July 28, 1953 (R. 38). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Petitioner Drew Pearson broadcast over the facilities of the American Broadcasting Company on January 30, 1949 the following:

> "Detroit. The Justice and Treasury Departments have ordered the prosecution of Dr. Bernard F. Gariepy of Royal Oak, Michigan, in a strange income tax case indirectly involving Father Coughlin. Dr. Gariepy's defense is that Father Coughlin gave him $68,000 because of alienation of affection of Mrs. Gariepy by the radio priest. The Justice Department plans to prosecute Gariepy anyway."

And on February 6, 1949:

> "Despite denials, the income tax case of Dr. Bernard F. Gariepy, indirectly involving Father Coughlin, will be brought to trial. When that trial takes place we will see who was really telling the truth."

The action was brought by the divorced wife of Dr. Gariepy.

1. Did the United States Court of Appeals for the District of Columbia Circuit restrain freedom of speech and the press contrary to the First Amendment and the due process clauses of the Fifth and Fourteenth Amendments by ruling

that a fair and impartial report of a defense of a taxpayer in a tax evasion proceeding *might* libel a third party?

2. In construing the words of the broadcasts, which of the following is the proper legal standard: whether the words *might* possibly be understood as defamatory; or, whether a defamatory construction *is reasonable* under the circumstances?

3. Whether reference to a $68,000 settlement of an alienation of affection claim alone can give to the words "alienation of affection" a connotation of unchastity?

4. Whether a Circuit Court remand for a jury trial of a libel action where the basic complaint does not allege libel *per se* and is without a sufficient showing of special damages, denies to defendant the traditional assurances of due process provided by the common law and the Fifth and Fourteenth Amendments.

STATUTES INVOLVED

The pertinent Constitutional provision involved is Amendment I to the Constitution of the United States, U.S.C. Vol. I, page XLII, which reads: "Congress shall make no laws ... abridging the freedom of speech, or of the press; * * *" The due process clauses of the Fifth and Fourteenth Amendments are also involved.

STATEMENT

Dr. Bernard F. Gariepy is a medical doctor who maintained his office and practice in Royal Oak, Michigan. In 1935 he married Mary G. Gariepy and they lived separately while he was undergoing further training until 1938, when they set up housekeeping in Royal Oak. Domestic difficulties developed and Mary Gariepy consulted her parish priest, the Reverend Father Charles E. Coughlin, concerning her problems, but the Gariepys were divorced in Pontiac, Michigan, in 1943 after a brief separation in 1942. (Mary G. Gariepy Deposition, pp. 28, 33, 54, 71)

During the years 1946 through 1948, the Bureau of Internal Revenue, under statutory authorization, instituted proceedings against Dr. Gariepy to investigate him for income tax evasion. Dr. Gariepy was represented in these proceedings by his general counsel, his tax consultant and his tax attorney. In testifying before Treasury Agents in 1946, Dr. Gariepy stated that his lawyer would explain an alleged discrepancy of $91,800 (Kitchen Deposition, pp. 6-8) in his unreported income and his lawyer supposedly had a ruling from the Bureau of Internal Revenue saying that the money was non-taxable (Kitchen Deposition, p. 9). Dr. Gariepy told his attorney Gillespie that he had received a sum of money by reason of, as he described it, "an alienation of affection" (Gillespie Deposition, p. 18). On October 28, 1946 and November 21, 1946, Dr. Gariepy introduced two formal statements in the Treasury Department proceeding attempting to explain the purpose of receipt of the alleged additional income. Gariepy told his tax consultant that he had received a gift of $50,000 in 1942 and $18,000 in 1943 and 1944 (Whitfield Deposition, p. 49) from Father Coughlin (Whitfield Deposition, p. 50), $50,000 in cash being delivered to him by Father Coughlin in a paper sack (Whitfield Deposition, p. 52). Gariepy's tax consultant advised him that such "gifts" were not taxable (Whitfield Deposition, p. 29). Gariepy was unable to carry the burden of proving these facts in the Treasury Department proceeding, and the determination was made to transfer the case to the Department of Justice with the recommendation of prosecution.

During the summer of 1948, official proceedings authorized by statute were conducted by the Department of Justice in its offices in Washington, D. C. Present at the hearings representing Gariepy were his tax consultant Whitfield and his tax attorney O'Hara; representing the Government were the then Head of the Tax Division and one of his associates. Gariepy's defense of having received $68,000 from Father Coughlin for "alienation of affection" was again

raised, but the Department of Justice decision was also adverse to Gariepy. He had failed to prove his case, and the administrative determination was made—Gariepy would be prosecuted for income tax evasion.

Subsequently, petitioner Drew Pearson came on the air over the facilities of the American Broadcasting Company and reported on the decisions reached in these administrative proceedings. On January 30, 1949, he broadcast the following:

> "Detroit. The Justice and Treasury Departments have ordered the prosecution of Dr. Bernard F. Gariepy of Royal Oak, Michigan, in a strange income tax case indirectly involving Father Coughlin. Dr. Gariepy's defense is that Father Coughlin gave him $68,000 because of alienation of affection of Mrs. Gariepy by the radio priest. The Justice Department plans to prosecute Gariepy anyway." (R. 10A)

And on February 6, 1949, he reported:

> "Despite denials, the income tax case of Dr. Bernard F. Gariepy, indirectly involving Father Coughlin, will be brought to trial. When that trial takes place we will see who was really telling the truth." (R. 10A)

This report of petitioner Drew Pearson was confirmed on April 5, 1949, when a then Assistant Attorney General publicly announced in the *Detroit Free Press* that the Gariepy case would be brought to trial. Gariepy was indicted on April 29, 1949, and tried from October 28 through November 11, 1949. At the trial, one of his defenses was the same as reported by petitioner Drew Pearson. He lost again, and was convicted of tax evasion. The conviction was affirmed by the United States Court of Appeals for the Sixth Circuit. *Gariepy* v. *U. S.*, 189 F. 2d 459.

Long after her former husband's trial and almost seven years after the divorce, respondent, Mary G. Gariepy, on January 28, 1950 filed a complaint for libel against petitioners alleging that mention of the alienation of affection

defense of Dr. Gariepy to the tax evasion charge in the broadcast was tantamount to accusing plaintiff of unchastity while a married woman. The answers admit the language of the broadcasts, and defend on the grounds that the broadcasts were fair reports of executive and subsequent judicial proceedings, were true in substance, and constituted fair report and comment on matters of public interest (R. 8A-13A).

It is a matter of public record that the alleged libelous statements of Drew Pearson were true. Dr. Gariepy was prosecuted for income tax evasion. He did present as one defense the allegation that he had received certain moneys from "a prominent citizen of Royal Oak, Michigan" and that these moneys were non-taxable for the reason that, among other reasons, they were given to him by the "prominent citizen" because of a relationship between the giver and Gariepy's wife. All these facts appear in the public transcript of the trial and in the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Gariepy* v. *U. S.*, 189 F. 2d 459, 463. They also appear, in substance, in depositions which supported the motion for summary judgment (R. 16A, 17A). While the appellate court in the Gariepy tax case did not mention Father Coughlin by name, his identity as a "prominent citizen of Royal Oak, Michigan" is made clear in the transcript and the depositions.

Petitioners moved for summary judgment and contended that the words in the alleged libel do not support the innuendo of unchastity and were therefore not libelous, and that the publications were protected by the defenses of qualified privilege and fair comment (R. 13A). The district court ruled that the reasonable and usual meaning of the words "alienation of affection" used in the broadcast do not support an innuendo which would make such words defamatory and that one reporting the news should not be "charged with liability by giving to statements made a strained and unusual meaning to afford a basis for an evil innuendo

when the usual meaning of such words is not evil," and granted the motion for summary judgment. 104 F. Supp. 681. The United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court in a two-to-one decision on June 11, 1953, and rehearing was denied (also by a two-to-one decision) by order dated July 28, 1953.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to find that the alleged libelous broadcasts were accurate news reports of a tax evasion case under investigation by the Treasury Department concerning a matter of public interest and that such reports are protected by the First, Fifth and Fourteenth Amendments from the necessity of proving the truth of contentions accurately reported.

2. In failing to find that the statement made in the broadcast, "Dr. Gariepy's defense is that Father Coughlin gave him $68,000 because of the alienation of affection of Mrs. Gariepy by the radio priest," was not defamatory of the plaintiff and that the mentioning of her name was necessary in order to give an accurate account of a matter of public interest.

3. In finding that the words, "alienation of affection," as used in the broadcast in connection with the defense offered by Dr. Gariepy *might* be understood as implying that the plaintiff was an unchaste wife and that therefore the jury should be permitted to decide whether they actually were so understood.

4. Having ruled that the nature of the publication was a jury question and thus not libelous *per se*, in failing to find that the complaint did not state a cause of action because of the absence of sufficient allegations of special damage.

REASONS FOR GRANTING THE WRIT

1. In failing to affirm the summary judgment for petitioners, the United States Court of Appeals for the District of Columbia Circuit deprived petitioners of the rights of free speech and press guaranteed by the First Amendment to the Constitution and the protection that should be afforded to one reporting news against being charged with liability for so doing by giving to statements made a strained and unusual meaning to afford a basis for libel action, and thus has decided a question of substance and general importance relating to the construction and application of the Constitution. The due process clauses of the Fifth and Fourteenth Amendments extend the First Amendment protections to judicial action which restrict free speech as effectively as Acts of Congress.

2. The decision of the United States Court of Appeals for the District of Columbia Circuit in reversing the judgment of the United States District Court for the District of Columbia on the theory that the term "alienation of affection" *might* be understood to support an innuendo of unchastity as charged in the complaint is in conflict with the rule followed by the United States Court of Appeals for the Fourth Circuit in *Phillips* v. *Union Indemnity Co.* (1928), 28 F. 2d 701, that the defamatory character of a publication depends on whether, giving the words their reasonable and usual meaning, they were reasonably susceptible of a defamatory meaning, not whether they can possibly be construed so as to have a defamatory meaning.

3. The ruling of the United States Court of Appeals for the District of Columbia Circuit that because of the amount of money allegedly paid to Dr. Gariepy, the words "alienation of affection" *might* be found by a jury to impute unchastity to the respondent where the words in their usual and legal meaning simply connote a change in mental attitude of one spouse toward the other, so far departs from judicial precedent and from the usual and accepted prin-

ciples applied in determining the defamatory character of the words as to call for an exercise of this Court's power of supervision.

4. In remanding the case for jury trial where the complaint fails to allege libel *per se* or to present a sufficient showing of special damages, the appellate court so seriously misconstrued the requirements of common law and Fifth and Fourteenth Amendment due process as to call for review of its action by this Court.

1. *Accurate news reports of an official proceeding are protected by the First Amendment to the Constitution, as well as by the Fifth and Fourteenth Amendments.*

The effect of the decision of the court below is to require any news commentator reporting on an official proceeding to submit to trial by jury on the issue of whether some of the words he used *might* be considered defamatory by a small segment of the population, even though the words *are* not defamatory by themselves and the report itself is fair and impartial. We submit the requirement of jury trial under such circumstances is as effective a muzzle on the exercise of the constitutional freedom of press as an Act of Congress and represents a clear-cut deprivation of property rights without due process of law under the Fifth and Fourteenth Amendments. When juries are allowed to decide questions of law which should be reserved to the court, the heavy damages and expenses to which a defendant may be forced to submit can become a most effective restraint on freedom of the press. Unless the court below is reversed, news commentators will be wrapped in a legalistic straightjacket which will prevent them from truthfully reporting news of public interest unless they are prepared to vouch for the accuracy of all defenses or allegations asserted by a person whose activities are reported.

The first question to be explored in this case is how far does the First Amendment go toward protecting a defendant in a libel case who has fairly and impartially reported

an official proceeding. We recognize that essential parts of the question are whether his reporting was fair and impartial and whether the proceeding covered was an official proceeding. But analysis should begin with the meaning of the First Amendment.

Justice Holmes put the issue squarely in *The Common Law, Modern Library Edition,* p. 139, when he said of defenses in slander and libel cases that:

> "Again, the real substance of the defense is not that the damage was not intended . . . ; but that whether it was intended or not . . . , the manifest facts and circumstances under which he said it were such that the law considered *the damage to plaintiff of less importance than the benefit of free speaking.*" (Emphasis supplied)

In *West Virginia State Board of Education* v. *Barnette* (1943), 319 U. S. 624, 638, Justice Jackson said for the majority:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and *to establish them as legal principles to be applied by the courts.* One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other *fundamental rights* may not be submitted to vote, they depend on the outcome of no elections." (Emphasis supplied)

The First Amendment prohibits not only prior restraint or censorship of criticism; it also protects against *any* attack which suppresses fair reporting of matters of public interest. The prohibition against suppression of free speech is directed to any governmental acts which abridge speech, "whether the abridgment is attempted by the executive, the legislative, or the judicial arm of government." *Miller, Principles of Law Limiting Radio Broadcasting,* 9 F.R.D. 217, 228, and cases there cited. The safeguards of

free speech and a free press apply to whatever means the attempted abridgment uses, whether court injunction, *Near* v. *Minnesota,** 283 U.S. 697, or summary contempt proceedings, *Craig* v. *Harney,* 331 U.S. 367, *Bridges* v. *State of California,* 314 U.S. 252; *Pennekamp* v. *State of Florida,* 328 U.S. 331.

In short, the First Amendment places any speech or printed report in the public domain when it touches on matters of public concern. If a balancing of the various values of the speech against the competing risks of the harm from it results in a prudent man's judgment that the public interest in untrammelled publication outweighs occasional private or public injuries which may result, then the speech should be protected by the First Amendment. *Klaven, Univ. Chicago Conference on the Arts, Publishing and the Law* (1952), pp. 16-17. By analogy with the "clear and present danger" cases, this public interest is not to be disregarded unless language is so clearly defamatory, false and damaging as to present a danger to segments of the public which outweighs the importance of the Constitutional protections to the whole body politic.

Was what Pearson said through the facilities of American Broadcasting Company fair and accurate comment about an official proceeding?

The comment was at least fair and accurate. Pearson, on January 30, 1949, reported that the Justice and Treasury Departments had ordered the prosecution of Dr. Gariepy "in a strange income tax case." The case was strange because it "indirectly involved Father Coughlin." It indirectly involved Father Coughlin because Dr. Gariepy's

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* In the *Near* case this Court held that the States are precluded from abridging freedom of the press by the due process clause of the Fourteenth Amendment. The twofold nature of the jurisdiction of the courts of the District of Columbia is well known to this Court and should make clear that either the Fifth or the Fourteenth Amendments due process clauses are applicable to judicial action in the District of Columbia which abridges freedom of speech and press.

defense in part was that Father Coughlin gave Gariepy $68,000 as a result of alleged alienation of affection of Mrs. Gariepy by the radio priest. Despite this defense, the Justice Department planned to prosecute Gariepy anyway, apparently not crediting the defense.

Every fact reported was demonstrably accurate. Gariepy's prosecution had been ordered. A week later on February 6, 1949, when Pearson returned to the subject, he repeated that Dr. Gariepy would be brought to trial in a tax case indirectly involving Father Coughlin and said when the trial takes place "we will see who was really telling the truth."

No newspaper or news commentator could have been more careful in warning his listeners that the defense claimed by Dr. Gariepy might not be credible. He cautioned that the Justice Department apparently did not consider the defense valid and that the trial would disclose who was telling the truth. As District Judge Morris said:

> "If any intimation or innuendo accompanied the words which were used by the defendant Pearson, from a reading of the statement in its entire context, it is that the defendant Pearson did not believe the statement of Dr. Gariepy to be credible, and that such was also the view of the Justice Department." (R. 20A)

These facts establish the broadcasts as fair report and comment on a matter of public concern upon which no action lies. See *Brewer* v. *Hearst Pub. Co.* (7th Cir., 1950), 185 F. 2d 846; *Restatement, Torts;* Sec. 606; 53 C.J.S. 210 et seq. "It is well settled that fair criticism or comment on matters of public interest is not actionable in the absence of malice, i.e., bad faith or bad motive." *Potts* v. *Dies* (1942), 77 U.S. App. D. C. 92, 132 F. 2d 734, 735, *cert. den.* 319 U.S. 762. Though fair comment might enable some journalists and others to escape liability for even defamatory language which offends the taste and moral sense of a substantial part of the community, this occasional abuse is part of the price of free speech. 62 *Harv. L. Rev.* 1207, 1216.

Was the proceeding about which Pearson was reporting an "official proceeding?"

Since this country began, the public has had a vital and legitimate interest in tax evasion cases. The Whiskey Tax rebellions of the late 1790's provide an early example. Today, after the impact of two World Wars, tax evasion is a serious crime directly affecting national security.* It is the public interest in a proceeding which makes the proceeding official and protects reports of it.

The proceeding was official at the stage when Pearson reported, and hence in the absence of malice his report was privileged. 53 C.J.S. 201.

Any lawyer familiar with tax work knows that the administrative conference he has with Treasury and Justice Department officials can be as decisive of the rights of his client as the trial which might become the ultimate end of administrative procedure. The reality, not the form, of the "official proceeding" determines whether the public interest justifies the protection of privilege. The *Restatement, Torts,* Section 611, *comment b,* recognizes that the rule of privilege applicable to reports of judicial and legislative proceedings extends to reports of the executive or administrative actions of officials of the nation, state or any municipal corporation and to proceedings and actions of other organizations which are by law authorized to perform

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* That the administration and enforcement of the tax evasion statutes were at full peak during the period critical in this case is evident from the following statistics:

	1947	1948	1949
Tax fraud cases investigated	4125	3806	2962
Cases in which prosecution recommended	925	988	848
Individuals tried	190	328	356
Convictions or pleas	182	315	346
Additional taxes and penalities	$199,787,798	$228,808,194	$271,831,308

(*Tax Fraud Cases,* Section of Taxation, American Bar Association (1951).

public duties, such as a medical society or a bar association charged with authority to license practitioners.

In fact, the privilege attaches even to proceedings which, although not authorized by law, are nevertheless in their nature public proceedings because they vitally concern the public at large. Thus, in *Farrell* v. *New York Evening Post*, 3 N.Y.S. 2d 1018, 167 Misc. 412, the New York Court held that the test of the rule of privilege to report an official proceeding was not restricted by the fact that the proceeding was not open to the public, so long as the nature of the proceeding was such as to make it of general interest and concern to the public. Reports of criminal proceedings are privileged even though preliminary or *ex parte* in their nature. In the District of Columbia it has been held that a fair report of a meeting of the board of deacons and the congregation of a church may be privileged. *Pinn* v. *Lawson* (1934), 63 U.S. App. D. C. 370, 72 F. 2d 742, 744.

In this case, we are concerned with fair and impartial reports of proceedings conducted by officials of the executive branch of the Federal government. The Bureau of Internal Revenue (now Internal Revenue Service) and its agents have the authority to examine books, papers, and records, to take testimony of individuals, to summon witnesses and to administer oaths. *Internal Revenue Code*, Sections 3614, 3615, 3632. It is during these proceedings that a taxpayer is advised that criminal prosecution is under consideration by the Bureau of Internal Revenue. The taxpayer then testifies and sets up his defenses, and the merits of the case are argued by his counsel. If the Bureau is persuaded that there was no willfulness or intent to defraud, the matter is dropped so far as criminal prosecution is concerned. If the Bureau concludes that in its opinion, based upon the record and argument, there is guilt *beyond a reasonable doubt*, then the case is transferred to the Department of Justice with the recommendation of prosecution. *Tax Fraud Cases, Section of Taxation, American Bar Association, supra*, pp. 13-26. The procedure before the

Bureau of Internal Revenue is formal, official and adverse, concerned with a matter of public interest. It is as much a quasi-judicial function of an administrative agency as a formal hearing before the Interstate Commerce Commission and other Federal agencies and certainly no one now denies that reports of such hearings fall within the defense of privilege. The same can be said of the proceedings in which Dr. Gariepy participated before the Department of Justice. If the public interest in being informed of proceedings before a church board of deacons, or a bar or medical association, is more vital than a possible incidental private injury, then the public interest in a proceeding so important as a tax fraud case must prevail.

Any relaxation of these principles of libel law which tends to penalize accurate reporting of an official matter of public concern collides immediately with the First Amendment protection of freedom of the press. The penalty and expense of trial and libel judgments risked by a reporter or commentator if the law is to be interpreted as requiring him, in the words of one observer "to prove the truth of all the nasty things the people said about each other in the proceeding." (*John B. Martineau, University of Chicago Conference on the Arts, Publishing, and the Law, supra,* p. 21) is as effective a suppression of freedom of press as would be an injunction against publication of any criticism in the first instance.

We have said that an analogy to the public interest test may be found in the series of cases dealing with the clear and present danger test of the permissible limits of freedom of speech. The multitude of cases philosophizing on the meaning of the clear and present danger test requires, in the interest of brevity, the selection of only a few to demonstrate the point. In *Bridges* v. *California* (1941), 314 U.S. 352, the Supreme Court examined the Constitutional aspects of contempt of court by publication. The case involved, among other things, editorial attacks on a judge's decision in litigation affecting labor unions. This court,

reversing a contempt finding, held that the First Amendment "must be taken as *a command of the broadest scope* that explicit language, read in the context of a liberty-loving society, will allow." (Emphasis supplied.) The Court balanced the public interest in freedom of comment against the severity of the criticism of judicial proceedings and concluded that the former outweighed the latter.

In *Pennekamp* v. *Florida* (1946), 328 U.S. 331, this Court in reversing a contempt conviction in Florida based on criticism of judicial actions in criminal cases, said that the Constitution imposes upon the United States Supreme Court the sole authority to determine when words carry a sufficient threat of clear and present danger to our form of society to justify a contempt conviction. The Court observed:

> "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve . . . In the border line instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." Pp. 346, 347.

In each of the two cited cases as in most of the "clear and present danger" cases, this Court decided the issue of whether the public interest in a particular expression of ideas or criticism outweighs the threat of the speech to an institution of government. Yet in this libel case the public interest in tax evasion matters is to be balanced against a wholly incidental injury, if any, which truthful reporting of an official proceeding may have caused a third party. The court below remands for trial on the sole ground that the "unusual amount (alleged by Dr. Gariepy to have been received from Fr. Coughlin for alienation of affection) *might be t*hought to imply unusual circumstances." (Em-

phasis supplied.) On how precarious a base will our Constitutional protection of freedom of speech rest if the necessity of proving to a jury in a civil case the truth of all the defenses a man makes in a criminal proceeding depends not on the accuracy of the reporting but on the interpretation given to simple factual statements by a minority of listeners with "an evil eye serving an immoral mind"? *Cannon* v. *Bee News Pub. Co.* (D.C. Neb. 1933), 8 F. Supp, 154, 155.

There is no more certain method of extinguishing freedom of the press than to circumscribe its exercise within impracticable limitations which force an individual to weigh each word he uses in the light of its possible effect on the minority of evil-minded people in a given community. A servile and sterile press may hurt no one, but neither does it help the public nor assist in the preservation of our freedoms. Every curtailment of the right of fair and impartial comment on matters of public interest invades the fundamental rights guaranteed by the First Amendment.

The ever increasing activity of executive and legislative agencies in the field of investigation, especially into the realm of taxation with which the public is so vitally concerned, demonstrates the importance of the questions raised in this case. The action of the Court of Appeals represents an abridgment of Constitutional guarantees of which this Court is the ultimate guardian.

2. *The decision of a majority of the lower court in this case should be reviewed because it is in conflict with the per curiam decision of the Court of Appeals for the Fourth Circuit in Phillips v. Union Indemnity Co. (1928), 28 F. 2d 701.*

Whether a publication is reasonably capable of bearing a defamatory meaning is a question of law for the Court to determine. *Caldwell* v. *Hayden* (1914), 42 U.S. App. D.C. 166. If the Court is satisfied that the words as used are not capable of being so construed by reasonable people, the action should be dismissed.

In reversing the District Court, the United States Court of Appeals for the District of Columbia Circuit, conceded that the words "alienation of affection" do not usually imply unchastity but held that the term as used *might* be construed so as to have a defamatory meaning. In its opinion, the appellate court says:

> "In the statement '. . . Father Coughlin gave him $68,000 because of alienation of affections of Mrs. Gariepy . . . ,' the unusual amount *might* be thought to imply unusual circumstances.
>
> ". . . Therefore the question for the Court in the present case was whether appellees' broadcasts *might* reasonably be understood as implying that appellant was an unchaste wife. In our opinion they clearly *might*." (Emphasis supplied) R. 25.

Instead of applying the "reasonable and usual" test used by the trial judge in determining whether the words were reasonably susceptible of a defamatory meaning, the Court of Appeals applied the test of whether or not the words can possibly be construed so as to impute unchastity to the plaintiff. The emphasis of the opinion of the majority of the Court is on the word "*might*."

This construction of the law of libel conflicts with the principles laid down in the decision of the Fourth Circuit Court of Appeals in *Phillips* v. *Union Indemnity Co., supra,* and with the common law.

In the *Phillips* case the Court said that "the test is not whether the language can possibly be construed so as to have a defamatory meaning, but whether it is reasonable under the circumstances so to interpret it." 28 F. 2d at 703. Plaintiffs were former agents of defendant insurance company. The gist of the alleged libel was that defendant had sent out notices to policyholders notifying them that their policies were cancelled for non-payment of premiums when in fact the agents had forwarded such premiums to the company. Plaintiffs alleged by way of

innuendo that by such notices and cancellation of policies defendant intended to convey that plaintiffs had not remitted the premiums and were dishonest in their business dealings and unworthy of public confidence. The Court of Appeals ruled that the publication, taken in connection with all the facts and circumstances, was not *reasonably* susceptible of a libelous meaning and hence not actionable. With respect to the innuendo, the Court stated that it "cannot be used to give a forced and unnatural construction and application of the words, but only a reasonable and natural construction and application." The Court said:

> "Furthermore, since the injurious character of the publication and the harm done to the plaintiff depends upon the manner in which the writing is understood by those to whom it is uttered, it must be read and construed in the sense in which the reader would ordinarily understand it; and if, when thus considered, it cannot reasonably be interpreted as defamatory, it will not serve as a basis for the action." 28 F. 2d at 703.

In finding that the inference that defendant intended to charge plaintiffs with dishonesty, as alleged by the innuendo, was not reasonable under the circumstances, the Court concluded:

> "It was of course *not impossible* for some policyholder, turning over in his mind all the contingencies, to suppose that the agents had improperly retained the premiums, *but the test is not whether the language can possibly be construed so as to have a defamatory meaning, but whether it is reasonable under the circumstances so to interpret it.*" (Emphasis supplied) 28 F. 2d at 703.

In accord with the principles of the *Phillips* case is the Ninth Circuit Court of Appeals, *Lorentz* v. *R.K.O. Radio Pictures* (1946), 155 F. 2d 84, 87, in which the court refers to and relies on the *Phillips* case, and the Seventh Circuit Court of Appeals, *Brewer* v. *Hearst Pub. Co.* (1950), 185 F. 2d 846, 850.

The case of *Cannon* v. *Bee News Pub. Co.* (D.C. Neb. 1933), 8 F. Supp. 154, is very much in point here. Bishop James Cannon, Jr., alleged that a newspaper article, by innuendo, charged him with committing adultery with a Mrs. McCallum. The defendant demurred and the court sustained the demurrer and dismissed the complaint. The court summarized its position in a holding that is equally applicable to the case before this Court when it said: (8 F. Supp. at 157)

> "Reading the whole article over, and giving the words their plain ordinary meaning, no slanderous or libelous statements will be found therein. Now it is *possible* that to an evil eye serving an immoral mind, one of such *might* draw deductions therefrom which are not justified by the statements. Still, it is to be rejoiced that the minds of the great mass of humans throughout the world are clean and wholesome and are not prone to attribute evil where none appears or none exists." (Emphasis supplied.)

The rule of law that "words will not be construed to impute unchastity, if in their milder sense they may have another harmless meaning" (*Cannon* v. *Bee News Pub. Co., supra*) is necessary and desirable. Otherwise, a news reporter would act in great peril because in a great variety of factual situations, it is possible for "an evil eye serving an immoral mind" to find an evil meaning.

The Phillips decision follows the common law and English authorities. *Gatley,* in his recently published book, *Libel and Slander,* 4th Edition, 1953, at page 126 says: (footnotes omitted)

> "In determining whether the words are capable of a defamatory meaning the judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning *might* succeed in extracting from them. That clearly is not the test. 'The test according to the authorities'

said Lord Selbourne, 'is whether, under the circumstances in which the writing was published, *reasonable* men to whom the publication was made would be likely to understand it in a libelous sense.' 'The law is perfectly well settled. Before a question of slander or libel is submitted to a jury, the Court must be satisfied that the words complained of are capable of the defamatory meaning ascribed to them. That is a matter of law for the court. . . .'The proposition has been established now upon authority which is difficult to question . . . that it is not enough to say that by some person or another the words *might* be understood in a defamatory sense.' *'It is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document.'* " (Emphasis supplied)

In determining whether words are capable of a defamatory meaning is the test whether it is *reasonable* under the circumstances to construe the language so as to have a defamatory meaning, which was the standard applied by the Fourth Circuit Court of Appeals in the *Phillips* case; or is the test whether the language *might* possibly be construed so as to have a defamatory meaning, which was the standard applied by the Court of Appeals for the District of Columbia in the present case? Since the issue in both cases was whether an alleged libelous publication would support an innuendo which would make the words defamatory and since the decisions are in conflict on the proper test to be used in determining the issue, it is submitted that which is the proper test to be applied is an important question of law which should be resolved by this Court.

While "canons of construction" stated in the abstract might be deemed to represent a "local question" of insufficient importance to warrant the attention of this Court, when the principle enunciated by the Court of Appeals is viewed in the light of the circumstances here presented, the question takes on a broader meaning. The American public has but one method of being informed of the activities of its Government and that is through the media of commercial

news enterprises. News writers and reporters must look to the decisions of the courts for guidance in determining what can and cannot be published in fulfilling their function, indeed, their duty, in keeping the public informed. The conflicting doctrines created by the action of the appellate court in the instant case throws a cloud of confusion upon the proper means of interpreting words, and newsmen as well as lower courts the country over are at a loss as to this important point in the law of defamation. The Court should accept this case for review in order to clarify the confusion now existing.

3. *The principle that because of the reference to the amount of money allegedly paid to Dr. Gariepy the term "alienation of affection" might be found by a jury to impute unchastity to the respondent when those words in their usual and legal meaning simply connote a change in mental attitude of one spouse toward the other caused by a third party, so far departs from judicial precedent and the usual and accepted principles applied in determining the defamatory character of words as to call for an exercise of this Court's power of supervision.*

The Court of Appeals agreed with the district court that the words "alienation of affection" do not usually imply unchastity. Cases are legend supporting the principle that those words, both in the usual sense and in a legal sense, mean nothing more than a change in mental attitude between spouses caused by a third party. However, the appellate court held that because of the reference to the amount of money allegedly paid to Dr. Gariepy, the term *might* take on an entirely different meaning from that generally and commonly understood. Such a ruling is without judicial precedent or logical support.

That the amount of money involved in an alienation of affection proceeding cannot inject an imputation of unchastity is made clear by concrete example. In *Woodhouse* v. *Woodhouse* (1925), 99 Vt. 91, 130 Atl. 758, the wife sued

her husband's parents for alienation of his affections and the jury awarded her *$465,000* which was reduced by the court to $125,000. And in *Mohn* v. *Tingley* (1923), 191 Cal. 470, 217 Pac. 733, the wife sued another woman, not a relative, for alienation of her husband's affections. The defendant was an official and leader of a society of which both the plaintiff and her husband were members. Evidence was introduced to show that the defendant dominated the plaintiff's husband and that he accepted her judgment and heeded her advice in preference to his wife's. There was not the slighest intimation of debauchery in the relationship between the plaintiff's husband and the defendant. The jury awarded plaintiff damages of $100,000 which was affirmed on appeal. The district court in the present case considered the proposition at hand and summarily dismissed it, stating:

> "Certainly the amount of money referred to could not give the words used a meaning different from the natural meaning of such words, nor distort them into support for the innuendo asserted." 104 F. Supp. at 684.

The Court of Appeals cited only two decided cases in support of its holding: *Peck* v. *Tribune Co.* (1909), 214 U.S. 185, and *Myerson* v. *Hurlburt* (1938) 68 U.S. App. D.C. 360, 98 F. 2d 232. Neither of those cases involved an "unusual amount of money" and the publications involved in both were clearly defamatory. Obviously those cases cannot control in this case and they are no support for the proposition that when an "unusual amount" of money is involved, words not otherwise defamatory *might* become defamatory.

The mere restatement of the Court of Appeals' proposition that the amount of money involved might give words a different meaning reveals the proposition's fallacy. If $68,000 might suggest a meaning to words different from their ordinary understanding, would $50,000, or $25,000, or $5,000? How could this rule possibly be administered

by a court with any degree of accuracy or reasonableness? Or how could this determination or dividing line between what might be a usual amount of money and an unusual amount be left to a jury?

There will always be a few members of the public who will interpret words in the most evil sense possible. Idle tongues rejoice at the opportunity of imputing unfaithfulness to a husband or wife where there might not be an iota of foundation for such imputation. Likewise, there are always a few who will take advantage of every opportunity to interpret words or actions of a clergyman in an evil sense. But the Court of Appeals has magnified the importance and size of this relatively minute group and the legal effect of the court's decision is to foster distortion of words. It has sanctioned an evil interpretation of words where no basis for such an interpretation exists by a ruling based upon an entirely novel principle of law not supported by legal authority or logic, and in doing so has so far departed from sound authority as to warrant the exercise of this Court's power of supervision in this matter of general importance.

4. *Where a complaint fails to allege libel per se or to present a showing of special damages, procedural due process assured by the Fifth and Fourteenth Amendments inherently require judicial determination that the complaint does not state a cause of action and should be dismissed.*

The legal effect of the holding of the court below is that the language alleged in the complaint is not libelous *per se*. The court said of the possible implication of unchastity from the words "alienation of affection" and the amount of money mentioned, $68,000, that "in our opinion they clearly *might*" imply unchastity and therefore ". . . a jury should be permitted to decide whether they actually were so understood." (Emphasis supplied) (R. 25) This is the same as ruling that there was no libel *per se* since the words used required innuendo to be defamatory.

In the District of Columbia and traditionally at common law it has long been held that where a court cannot hold that a publication is on its face libelous *per se,* any complaint for libel based thereon should be dismissed, or summary judgment granted, in the absence of sufficient allegations of special damages. *Thackrey* v. *Patterson* (1946), 81 U.S. App. D.C. 292, 157 F. 2d 614; *Sullivan* v. *Meyer* (1937), 67 U.S. App. D.C. 228, 91 F. 2d 301; *Holtz* v. *National Furniture Co.* (1932), 61 U.S. App. D.C. 80, 57 F. 2d 446.

In this complaint the showing of special damages was demonstrably insufficient as pointed out in the petition for rehearing although this point was not even commented upon by the appellate court in its opinion. (R. 28) To force a man to trial before a jury on the basis of a legally insufficient complaint violates the entire concept of procedural due process as guaranteed by both the Fifth and Fourteenth Amendments. *Pennoyer* v. *Neff* (1878), 95 U.S. 714.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari to the Court of Appeals for the District of Columbia should be granted.

Respectfully submitted,

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